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No. 03-1500

In the Supreme Court of the United States

THOMAS VAN ORDEN, PETITIONER

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the display of a monument containing the text of the Ten Commandments on the grounds of the state capitol, where it is part of a series of historic monuments erected on the grounds and where it is clearly demarcated as a private gift to the government, is consistent with the Establishment Clause.

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Charles Caffin & Ainsworth R. Spofford, *Handbook of the New Library of Congress in Washington* (1897) 12
49 Fed. Reg. (2004):
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p. 46,328 17
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p. 46,373 17
James M. Goode, *The Outdoor Sculpture of Washington D.C.: A Comprehensive Historical Guide* (1974) 12
http://www.foe.com/magazine/novdec2004/Nov04_02.pdf (visited Jan. 31, 2005) 2
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Letters of John Quincy Adams, to His Son, on the Bible and Its Teachings (James M. Alden ed. 1850) 9
George Olszewski, *A History of the Washington Monument 1844-1968 Washington, D.C.* (1971) 18
S. Rep. No. 1160, 89th Cong., 2d Sess. (1966) 17
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6 *The Works of John Adams, Second President of the United States* (Little & Brown eds., 1851) 8
Agnes Brown Trimble, *Washington's Shrine Draws Throngs*, The Evening Star, Oct. 9, 1937, at B1 11
William F. Walsh, *History of Anglo-American Law* (1932) (William W. Gaunts & Sons, 2d ed. 1993) 8

INTEREST OF THE UNITED STATES

This case concerns whether the display of a privately donated monument of the Ten Commandments, along with a number of other historic and cultural memorials, on the grounds of a state capitol is consistent with the Establishment Clause. In 1986, the Secretary of the Interior designated the Texas State Capitol, including its surrounding grounds, to be a National Historic Landmark. See 16 U.S.C. 461 *et seq.*[1] There are also numerous displays of the Ten Commandments on federal property and in federal buildings. The United States has participated as amicus curiae in prior cases addressing the constitutionality of governmental displays of religious symbols. See *McCreary County* v. *ACLU*, No. 03-1693 (to be argued March 2, 2005); *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984).

STATEMENT

1. The Texas State Capitol and its surrounding 22 acres of land contain "a wide array of monuments, plaques, and seals depicting both the secular and religious history of Texas." Pet. App. 3. The Goddess of Liberty adorns the capitol dome, J.A. 84, and a display in the Capitol Rotunda of the "Six Flags Over Texas" includes the Mexican Eagle and serpent (a symbol of Aztec prophecy), and the Confederate Seal with the inscription "Deo Vindice" ("God will judge"), Pet. App. 3; J.A. 162. The Aztec symbol also appears in a seal on the outside of the Capitol building. J.A. 63. There are currently 17 monuments on the grounds that commemorate "people, ideals, and events that compose Texan identity," Tex. H.R. Con. Res. 38, 77th Leg. (2001). They are: Heroes of the Alamo, Hood's Brigade, Confederate Soldiers, Volunteer Fireman, Terry's Texas Rangers, the

[1] Although the parties have stipulated that the Ten Commandments monument is an "element" of that Landmark, J.A. 93, the federal government's designation does not extend to the monuments themselves.

Texas Cowboy, Spanish-American War, Texas National Guard, Ten Commandments, Tribute to Texas School Children, Texas Pioneer Woman, the Boy Scouts' Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, Soldiers of World War I, Disabled Veterans, and Texas Peace Officers. J.A. 117. Numerous commemorative plaques are also displayed. J.A. 121-124, 126-127, 130, 141, 143-145, 148-149, 151-152. Most of the monuments were privately donated. Pet. App. 25 n.4; J.A. 57.

In 1961, the Fraternal Order of Eagles gave the people of Texas a large granite monolith on which is inscribed a "non-sectarian version of the text of the [Ten] Commandments." Pet. App. 4. The top of the monument contains two small tablets bearing an ancient script, separated by an eye inside a pyramid and the image of an eagle grasping the American flag. Two small Stars of David and the superimposed Greek letters Chi and Rho appear near the bottom. *Ibid.* Offset in a decorative, scroll-shaped box is a prominently engraved inscription reading: "PRESENTED TO THE PEOPLE AND YOUTH OF TEXAS BY THE FRATERNAL ORDER OF EAGLES OF TEXAS 1961." *Ibid.* It is one of the smallest monuments on the Texas Capitol grounds. See J.A. 87.

Texas accepted the Fraternal Order of Eagles' gift by a Concurrent Resolution, J.A. 97, which noted that the purpose of the donation was to "promote youth morality and to help stop the alarming increase in delinquency," Pet. App. 31 (citation omitted). The resolution "commended and congratulated" the Fraternal Order of Eagles "for its efforts and contributions in combating juvenile delinquency throughout our nation." *Ibid.*[2]

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[2] The donation was part of a nationwide campaign by the Fraternal Order of Eagles to provide troubled youth "with a common code of conduct." See *Books* v. *City of Elkhart*, 235 F.3d 292, 294 (7th Cir. 2000), cert. denied, 532 U.S. 1058 (2001). Estimates of the total number of monuments donated range from the hundreds to 5,000. See http://www.foe.com/magazine/novdec2004/Nov04_02.pdf; *Mercier* v. *Fraternal Order of Eagles*, No. 04-1321, 2005 WL 81886, at *11 (7th Cir. Jan. 3, 2005). While most of the monuments went on display in the 1950s and 1960s, challenges to their constitutionality do not appear to have arisen (with one exception, see *Anderson* v. *Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.), cert. denied, 414 U.S. 879 (1973)), until decades later.

The State Board of Control positioned the monument between the Capitol Building and the Supreme Court building, J.A. 101, where it was "continuously displayed on the Capitol grounds" until it was temporarily removed during construction in 1990, J.A. 91. Following the renovation, the monument was reinstalled at its original location, but was repositioned to face toward the West entrance of the Capitol. J.A. 92. That location "was carefully chosen by the Board's professional staff to reflect the role of the Commandments in the making of law." Pet. App. 15. Six other monuments are located in the same quadrant of the Capitol grounds—the Tribute to Texas School Children, Texas Pioneer Woman, th Boy Scouts' Statue of Liberty Replica, Pearl Harbor Veterans, Korean War Veterans, and Soldiers of World War I. J.A. 117. The Statue of Liberty Replica, the Soldiers of World War I, and the Pearl Harbor Veterans memorials can be seen from the area immediately surrounding the Ten Commandments monument. *Ibid.*; http://www.tspb.state.tx.us/SPB/Gallery/ CurrPhoto/3.htm.

2. Petitioner filed suit seeking a declaratory judgment that the display of the Ten Commandments monument violates the Establishment Clause and an injunction requiring the monument's removal. J.A. 12. The district court entered judgment for the respondents. Pet. App. 22-36. The court ruled that, "[v]iewed in the proper context, and in light of its history, this passive monument cannot be said to advance, endorse, or promote religion to a degree that would require the drastic remedy of ordering the [respondents] to remove it from the Capitol grounds." *Id.* at 35.

3. The court of appeals affirmed. Pet. App. 1-18. The court first held that the government's decision to permit the Fraternal Order of Eagles to erect the monument served the

valid secular purpose of "recogniz[ing] and commend[ing] a private organization for its efforts to reduce juvenile delinquency," and that petitioner had identified "nothing in either the legislative record or the events attending the monument's installation to contradict the secular reasons laid out in the legislative record." *Id.* at 9. In fact, "the State's treatment of other monuments on the Capitol grounds belies any * * * suggestion" that the espoused purpose was a sham. *Id.* at 10. In addition, because the monument stood on the Capitol grounds for more than four decades, the court reasoned that the State had a distinct secular purpose in simply "preserv[ing] a longstanding" monument. *Id.* at 16.

The court also ruled that the display did not have the effect of advancing religion because the Ten Commandments monument is just one of 17 monuments displayed on the State Capitol grounds that are "commemorations of people, ideals, and events that compose Texan identity." Pet. App. 13. The court emphasized that information provided by the State to visitors visually treats and discusses the Capitol grounds as a unitary, museum-like display of important historic and cultural influences. *Id.* at 13-14 & n.20. Finally, the court held, "[h]istory matters here," *id.* at 16, and "[e]ven those who would see the decalogue as wise counsel born of man's experience rather than as divinely inspired religious teaching cannot deny its influence upon the civil and criminal laws of this country." *Id.* at 14-15. The monument's placement between the legislative chambers, the executive office of the Governor, and the State Supreme Court "plainly linked" the monument with that legal heritage and "these law-giving instruments of State government." *Ibid.*

SUMMARY OF ARGUMENT

Petitioner and his amici advocate the adoption of rigid and sweeping bright-line rules of presumptive constitutional hostility to passive symbolic commemorations of this Nation's religious heritage. Three critical and interrelated considerations require that those arguments be rejected and that

respondents' display of the Ten Commandments monument be upheld.

First, as this Court has repeatedly recognized, the political and legal history of the United States is infused with religious influences, and the Ten Commandments are part of that history. Indeed, the image of the Ten Commandments' arched stones has become a pervasive and ubiquitous symbol in the Nation's art and architecture of law, religion's influence on the law, and religious freedom. Displays of the Ten Commandments thus have a broad "secular dimension as well as a religious meaning." Pet. App. 11.

Second, the surrounding context confirms the display's secular character. One important function of government is to preserve and commemorate the history and culture of its people. As a matter of common practice, state capitol grounds and buildings have become forums in which the public reasonably expects to find memorials to its political and cultural heritage, both religious and secular. The Texas Capitol grounds perform exactly that function. The Ten Commandments monument is only one of 17 memorials to important influences on Texas history and culture, and its location between the State Capitol and the State Supreme Court building underscores its legal symbolism.

Third, the Ten Commandments monument, like most of the monuments on the Capitol grounds, was a privately donated gift to the people of Texas. In belittling the court of appeals' conclusion that respondents' display of the monument reflects respect for the donor, petitioner and his amici overlook the deeply rooted tradition of government receiving gifts and donations on behalf of its citizenry, and the commonsense notion that, for both practical and constitutional reasons, government cannot spurn such gifts or refuse to accord them equal treatment solely because of their religious content. That time-honored custom informs the public's reaction to the display of such gifts. And when, as here, a monument has become such a longstanding and established fixture as to have independent historical significance, its selective

targeting for demolition would bespeak a level of hostility to religion that is antithetical to First Amendment values.

ARGUMENT

THE TEN COMMANDMENTS MONUMENT, AS PART OF A LARGER DISPLAY ON CAPITOL GROUNDS COMMEMORATING STATE HISTORY AND CULTURE, IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE

A. Religious Faith Has Played A Defining Role In The History Of The United States

"[R]eligion has been closely identified with our history and government." *School Dist. of Abington Township* v. *Schempp*, 374 U.S. 203, 212 (1963). Indeed, "[t]he fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Id.* at 213. This Court has "asserted pointedly" on five different occasions that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Lynch* v. *Donnelly*, 465 U.S. 668, 675 (1971); *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 672 (1970); *Schempp*, 374 U.S. at 213; *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952). Indeed, as a reflection of their belief that a "Creator" endowed each individual "with certain unalienable Rights," Decl. of Indep., 1 U.S.C. at XLIII, the Framers "conceived of a Federal Government directly responsible to the people * * * and chosen directly * * * by the people," *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 821 (1995). Accordingly, in applying the Establishment Clause, "[n]either government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring).

The Ten Commandments are an important part of that religious heritage. It is "undeniable * * * that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World," including the United States. *Stone* v. *Graham*, 449 U.S. 39, 45 (1980) (per curiam) (Rehnquist, J., dissenting). Indeed, it is widely recognized as a matter of

> historical fact that the Ten Commandments has served over time as a basis for our national law. * * * [A]t least to the extent that the Commandments established ethical or moral principles, they were expressions of universal standards of behavior common to all western societies. It was agreed that these moral standards, as influenced by the Judeo-Christian tradition, have played a large role in the development of the common law and have formed a part of the moral background for the adoption of the national constitution.

State v. *Freedom from Religion Found., Inc.*, 898 P.2d 1013, 1024 (Colo. 1995), cert. denied, 516 U.S. 1111 (1996).[3]

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[3] See *City of Elkhart* v. *Books*, 532 U.S. 1058, 1061 (2001) (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting from denial of certiorari) (the Ten Commandments "have made a substantial contribution to our secular legal codes"); *County of Allegheny* v. *ACLU*, 492 U.S. 573, 652 (1989) (Stevens, J., concurring in part & dissenting in part) (display of Moses with the Ten Commandments as a foundational lawgiver does not violate the Establishment Clause); *Edwards* v. *Aguillard*, 482 U.S. 578, 594 (1987) (rejecting the suggestion that "the Ten Commandments played an exclusively religious role in the history of Western Civilization"); *Griswold* v. *Connecticut*, 381 U.S. 479, 529 n.2 (1965) (Stewart, J., dissenting) (noting the nexus between "most criminal laws" and the Ten Commandments); *McGowan* v. *Maryland*, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring) ("State prohibitions of murder, theft and adultery reinforce commands of the decalogue."); *ACLU* v. *McCreary County*, 354 F.3d 438, 482 (6th Cir. 2003) (Ryan, J., dissenting) (noting the "indisputable historical role of religion, and especially the canons of the Decalogue, as one of many principles, ideas, values, and impulses that, taken together, influenced the founders of this republic in shaping our law and government"), cert. granted, 125 S. Ct. 310 (2004); *Freethought Soc'y* v. *Chester County*, 334 F.3d 247, 267 (3d Cir. 2003) (there is a "well documented history" that "the

At the most basic level, the Ten Commandments underlie the common law prohibitions on murder, adultery, theft, and perjury, which American law carried forward.[4] The Sunday Closing Laws upheld by this Court in *McGowan* v. *Maryland*, 366 U.S. 420 (1961), likewise are directly traceable to the Commandment to keep the Sabbath day, *id.* at 470-495, as well as the constitutional provision that excepts Sundays

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Ten Commandments have an independent secular meaning in our society because they are regarded as a significant basis of American law and the American polity, including the prohibitions against murder and blasphemy"); *King* v. *Richmond County*, 331 F.3d 1271, 1282 (11th Cir. 2003) ("Much of our private and public law derives from the[] final six commandments."); *Books*, 235 F.3d at 302 ("The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order."); *Anderson*, 475 F.2d at 33-34 (the Ten Commandments have "substantial secular attributes" and are a "foundation for law").

[4] See, *e.g.*, 1 William Blackstone, *Commentaries on the Laws of England: Of the Rights of Persons* 54 (1765) (Univ. of Chi. Press 1979) (with respect to *mala in se* crimes like murder, theft, and perjury, the legislature "acts only . . . in subordination to the great lawgiver, transcribing and publishing his precepts"); 6 *The Works of John Adams, Second President of the United States* 9 (Little & Brown eds., 1851) ("If 'Thou shalt not covet,' and 'Thou shalt not steal,' were not commandments of Heaven, they must be made inviolable precepts in every society, before it can be civilized or made free."); W. Walsh, *History of Anglo-American Law* 85 (1932) (W. Gaunts & Sons, 2d ed. 1993) (the 1641 Massachusetts "Body of Liberties" made the Ten Commandments "the basis of the criminal law"); Amicus Wallbuilders Br. at 3-25, *McCreary County* v. *ACLU*, No. 03-1693 (chronicling the influence of each Commandment on colonial law governing blasphemy, profanity, idolatry, Sunday closings, murder, adultery, theft, perjury, and defamation); *Freethought Soc'y*, 334 F.3d at 267-268 (linking the prohibition on taking the Lord's name in vain to "so help me God" in oaths); *Hollywood Motion Picture Equip. Co.* v. *Furer*, 105 P.2d 299, 301 (Cal. 1940) ("'Thou shalt not steal' applies with equal force and propriety to the industrialist of a complex civilization as to the simple herdsman of ancient Israel."); *Watts* v. *Gerking*, 228 P. 135, 141 (Or. 1924) ("'Thou shalt not bear false witness' is a command of the Decalogue, and that forbidden act is denounced by statute as a felony.") (citation omitted); *Weinstock, Lubin & Co.* v. *Marks*, 42 P. 142, 145 (Cal. 1895) (prohibition on covetousness linked to intellectual property law).

from the ten-day period for exercise of the presidential veto. U.S. Const. Art. I, § 7.[5]

At a more general level, the Ten Commandments reflect and have become symbolic of the historical reality that many early efforts at regulating human conduct had religious origins. "The law given from Sinai was a civil and municipal as well as a moral and religious code; it contained many statutes * * * of universal application—laws essential to the existence of men in society, and most of which have been enacted by every nation which ever professed any code of laws." *Letters of John Quincy Adams, to His Son, on the Bible and Its Teachings* 61 (James M. Alden ed., 1850). In particular, the Ten Commandments "served as a foundation for the formation of both English Common Law and the Napoleonic Code, which together laid the foundation for American jurisprudence." *Books* v. *City of Elkhart*, 235 F.3d 292, 312 (7th Cir. 2000) (Manion, J., concurring in part and dissenting in part), cert. denied, 532 U.S. 1058 (2001). The Commandments also have come to be understood as "a powerful teacher of ethics, of wise counsel urging a regimen of just governance among free people," Pet. App. 17, and in that respect have a nexus to our national history. Indeed, in 1997, the House and Senate passed concurrent resolutions acknowledging that (i) "the Ten Commandments have had a significant impact on the development of the fundamental legal principles of Western Civilization," (ii) "the Ten Commandments set forth a code of moral conduct, observance of which is universally acknowledged to promote respect for our system of laws and the good of society," and (iii) "the Ten Commandments are a declaration of fundamental principles that are the cornerstones of a fair and just society." S. Con. Res. 13, 105th Cong., 1st Sess. (1997); H.R. Con. Res. 31, 105th Cong., 1st Sess. (1997). "No judicial decree can erase that history and its continuing influence on our laws." Pet. App. 17.

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[5] See *City Council* v. *Benjamin*, 33 S.C.L. 508, 523 (S.C. Ct. App. 1848); *Kountz* v. *Price*, 40 Miss. 341 (1866).

B. Government May Commemorate The Decalogue's Influence On American History

1. The Ten Commandments are a ubiquitous and commonly recognized symbol of law

There "is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," *Lynch*, 465 U.S. at 674, and "references to the Almighty [have] run through our laws, our public rituals, [and] our ceremonies" since the founding of the Country, *Zorach*, 343 U.S. at 313. The First Congress—the same Congress that drafted the Establishment Clause—adopted a policy of beginning each session of Congress with prayer. See *Marsh*, 463 U.S. at 787. Since the time of Chief Justice Marshall, this Court has opened its sessions with "God save the United States and this Honorable Court." *Engel* v. *Vitale*, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting). In 1865, Congress authorized the inscription of "In God we trust" on United States coins, Act of March 3, 1865, ch. 100, § 5, 13 Stat. 518, and, in 1956, made that same phrase the National Motto, see 36 U.S.C. 302. The Great Seal of the United States includes the inscription *Annuit Coeptis*, which means "He [God] has favored our undertakings." J.A. 181-182. Indeed, "[i]t is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths." *Elk Grove Unified Sch. Dist.* v. *Newdow*, 124 S. Ct. 2301, 2322 (2004) (O'Connor, J., concurring in the judgment).[6]

[6] See also *Elk Grove*, 124 S. Ct. at 2317 (Rehnquist, C.J., concurring in the judgment) ("Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound.") (quoting H.R. Rep. No. 1693, 83d Cong., 2d Sess. 2 (1954)); *id.* at 2320 ("From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God."); *Lynch*, 465 U.S. at 675 ("Our history is replete with official references to the value and invocation of Divine guidance.").

Reproductions and representations of the Ten Commandments have been commonly employed in courthouses and state houses across the Country to symbolize the rule of law and the role of religion in the development of American law. That is due, in significant part, to the Decalogue's substantively influential role in legal history. But the ubiquity of the Ten Commandments image in monuments, art, and architecture also reflects the widespread value of the arched stones as a popular symbol of the law. Whether or not one subscribes to the Judeo-Christian faith traditions, the image of the twin arched stones alone evokes instantaneous and almost universal recognition within the United States as an image of the rule of law.[7] Indeed, Moses with the Ten Commandments appears, alongside other historic lawgivers, in a frieze within the chamber of this Court, as well as on the east facade of the Supreme Court building. The main reading room of the Library of Congress includes a painting of a woman praying, with the Ten Commandments by her side. The National Archives has embossed on the marble floor of its main display room a bronze seal that includes the image of two arched stones, representing the "10 Mosaic commandments on which the laws of our nation are based." Agnes Trimble, *Washington's Shrine Draws Throngs*, The Evening Star, Oct. 9, 1937, at B1. An informal and non-exhaustive survey identified displays of the Ten Commandments in almost every State. See App., *infra*; see also *ACLU* v. *McCreary County*, 354 F.3d 438, 482 (6th Cir. 2003) (Ryan, J., dissenting) (noting "[t]he history and ubiquity of the Ten Commandments in public buildings throughout the country").

Popular recognition of the Ten Commandments image also has made it a commonly employed emblem of religion and religious freedom. The statue of Moses holding the Ten

[7] See, *e.g.*, *King*, 331 F.3d at 1278 ("the outline of the Ten Commandments" has been employed historically to "enable[] illiterate citizens to recognize the legal validity of documents").

Commandments in the rotunda of the Library of Congress represents "Religion" in a gallery of images dedicated to valued pursuits. See C. Caffin & A. Spofford, *Handbook of the New Library of Congress in Washington* 64-65 (1897). In addition, a monument at the Ronald Reagan International Trade Building in Washington, D.C., depicts a female figure, her hands clasped in prayer, reclining against a tablet bearing the Ten Commandments, with the inscription "Liberty of Worship is Not a Concession nor a Privilege but an Inherent Right." See http://www.itcdc.com/explore.phy?p=4.[8]

In short, as a symbol of law, of religious influences on the development of American law, and of religious freedom, the image of the Ten Commandments is so commonly employed and so widely recognized that it has become "part of the fabric of our society." *Marsh*, 463 U.S. at 792; see *County of Allegheny* v. *ACLU*, 492 U.S. 573, 652 (1989) (Stevens, J., concurring in part and dissenting in part) (a display of "Moses holding the Ten Commandments, [even] if that is the only adornment on a courtroom wall, conveys an *equivocal message*, perhaps of respect for Judaism, for religion in general, or for law") (emphasis added). "Eradicating such references would sever ties to a history that sustains this Nation even today." *Elk Grove*, 124 S. Ct. at 2322.

2. The Establishment Clause permits the inclusion of passive religious symbols in broader historical and cultural displays

That uninterrupted pattern of official recognition of the role that religion, including the Ten Commandments, has played in the foundation of the Country, the formation of its governmental institutions and legal system, and the cultural and moral heritage of its people, counsels strongly against

[8] See also James Goode, *The Outdoor Sculpture of Washington, D.C.: A Comprehensive Historical Guide* 222 (1974) (sculpture outside the United States Court of Appeals for the District of Columbia Circuit of a kneeling woman, a man standing before a cross, and the Ten Commandments represents religious freedom).

construing the Establishment Clause to forbid respondents' display. And, in fact, this Court has twice considered and twice sustained governmental displays that similarly integrate overtly religious symbols with secular symbols of the Nation's heritage and culture.

In *Lynch* v. *Donnelly*, *supra*, the Court held that the Establishment Clause permits a city to include a nativity scene as part of a display that comprised "many of the figures and decorations traditionally associated with Christmas." 465 U.S. at 671. "[D]epict[ing] the historical origins of [a] traditional event long recognized as a National Holiday," the Court concluded, served a valid, secular goal. *Id.* at 680. In so holding, the Court refused to "focus[] almost exclusively on the creche," considering it sufficient that the display as a whole "principally take[s] note of a significant historical religious event long celebrated in the Western World." *Ibid.*

The Court further held that inclusion of the sectarian symbol in the display did not have the effect of advancing religion because any benefit to "one faith or religion or to all religions[] is indirect, remote and incidental," and "display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums." 465 U.S. at 683. The court stressed that the creche is a "passive symbol," indistinguishable from "a host of other forms of taking official note of * * * our religious heritage." *Id.* at 686. To forbid such displays "would be a stilted overreaction contrary to our history and to our holdings." *Id.* at 686.

Likewise, in *County of Allegheny* v. *ACLU*, *supra*, the Court sustained the inclusion of a menorah as part of a holiday display that included a Christmas tree and a sign saluting liberty. 492 U.S. at 614. A plurality concluded that, considered as a whole, the display did not amount to an "endorsement of religious faith but simply a recognition of cultural diversity." *Id.* at 619. Justice O'Connor concurred, ex-

plaining that, "[a]lthough the religious and indeed sectarian significance of the menorah is not neutralized," the "particular physical setting" in which the menorah appeared "changes what viewers may fairly understand to be the purpose of the display." *Id.* at 635 (internal quotation marks and citations omitted). Justice Kennedy, along with the Chief Justice, Justice White, and Justice Scalia, also concluded that the display was constitutional, because "the city and county sought to do no more than celebrate the season * * * and to acknowledge * * * the historical background and the religious, as well as secular, nature of the Chanukah and Christmas holidays." *Id.* at 663.

Moreover, in *Stone* v. *Graham*, *supra*, the Court recognized that the Ten Commandments may constitutionally be employed, even in the school context, when "integrated into the * * * curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42. In that case, the Court held unconstitutional a state statute that required the posting of the Ten Commandments by themselves on the wall of public school classrooms. But that "did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization." *Edwards* v. *Aguillard*, 482 U.S. 578, 594 (1987).[9]

Notably, in none of those cases did the Court apply the strict scrutiny that petitioner advocates (Br. 19-20), despite the sectarian content of the creche and menorah. That is because acknowledging religion's influence on culture and history in the same manner that other important social

[9] See also *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring) (posting the Ten Commandments "plainly ha[s] some secular objectives, such as instilling most of the values of the Ten Commandments and illustrating their connection to our legal system") (citations omitted); *Books*, 532 U.S. at 1061 (Rehnquist, C.J., Scalia & Thomas, JJ., dissenting from the denial of certiorari) ("[W]e have never determined, in *Stone* or elsewhere, that the Commandments lack a secular application.").

influences are commemorated demonstrates governmental neutrality toward, not advancement of, religion. Furthermore, religion is an undeniable and undeniably important part of American history that heavily influenced the design and development of the Nation's government and laws. To be sure, some religions have played a more prominent role in that history than others. But the Establishment Clause is not offended by such references because *acknowledging* the historic fact of those faith traditions' weighty influence on governmental design and culture is not the same as *endorsing* those religions. Just as one can readily acknowledge the profound influence of faith on the work of Dr. Martin Luther King or Johann Sebastian Bach without subscribing to or propounding their theology, government's commemoration of religious influences on American history does not amount to endorsement of those faiths. To declare, as petitioner advocates, every acknowledgment of religion's influence to be presumptively invidious and constitutionally suspect, and thus subject to the most exacting judicial scrutiny, would effectively render governmental commemoration of that defining aspect of the Nation's heritage taboo. "It is far too late in the day to impose [that] crabbed reading of the Clause on the country." *Lynch*, 465 U.S. at 687.[10]

C. Respondents' Display Serves A Legitimate Secular Purpose

Government action runs afoul of the purpose inquiry only if it is "entirely motivated by a purpose to advance religion." *Wallace* v. *Jaffree*, 472 U.S. 38, 56 (1985), see *Lynch*, 465 U.S. at 680 (law invalid if "there [is] no question" that it is "motivated wholly by religious considerations"). No such showing was made here.

[10] Strict scrutiny should be reserved for governmental programs like those at issue in *Larson* v. *Valente*, 456 U.S. 228 (1982), that actively classify, compel, or coerce individual behavior on sectarian lines. Passive displays that simply commemorate culture and history and that passersby are free to ignore do not inherently warrant such judicial suspicion.

1. The display honors the donor on fair and equal terms

Respondents' continued display of the Ten Commandments monument serves the valid secular purpose of honoring the important and publicly beneficial work of the Fraternal Order of Eagles, in the same way that Texas honors other entities by accepting and retaining their donated monuments. The historic record is undisputed. The Concurrent Resolution accepting the monument explained that the Fraternal Order of Eagles was donating the monument to Texas "to promote youth morality and to help stop the alarming increase in delinquency," and that Texas accepted the monument and permitted its display specifically to "commend[] and congratulate[]" the Fraternal Order of Eagles "for its efforts and contributions in combating juvenile delinquency throughout our nation." J.A. 97. Tellingly, the State Preservation Board's map of the installation site refers to it as the "Eagles Monolith," rather than the "Ten Commandments monument." J.A. 102. That the monument is situated in the same general area as other memorials focusing on family and children—the Tribute to Texas School Children, Texas Pioneer Woman, and the Boy Scouts' monument, J.A. 95, 134-137—underscores that the Fraternal Order of Eagles' work with children underlay acceptance of the monument. See Pet. App. 6 ("[W]ith its proximity to the pioneer woman holding a child and to the figures of children at play, it would be seen as a fit location to express appreciation for the work of the Eagles with American youth.").

Despite that record, petitioner insists (Br. 21) that the stated purpose was a "sham" and that the State's true desire was "to express and exalt this religious text." The short answer is that four out of four judges who examined the record in this case found otherwise. Pet. App. 9-11, 16, 31; see also *Freedom from Religion*, 898 P.2d at 1024. Texas's similar expressions of respect in accepting other donated monuments confirm the point. See Tex. S. Con. Res. 4, 52d Leg., 1951 Tex. Gen. Laws 1495, 1495 (accepting Statue of Liberty replica "in honor of the Boy Scouts of America," and "to honor the youth of Texas who are members of the * * * Boy Scouts of America"); Tex. H.R. Con. Res. 180, 66th Leg., 1979 Tex. Gen. Laws 3168 (accepting the Disabled American Veterans Memorial to "express appreciation to Disabled American Veterans, Department of Texas, for the organization's magnanimous and patriotic gift").

Petitioner insists (Br. 21) that "accepting a gift from an organization is a dubious way of honoring it." That is wrong. Government officials frequently receive, on behalf of their government and citizens, gifts from other governments and non-governmental entities. Indeed, gift exchanges are such an entrenched and integral part of the dialogue of international relations that the Constitution refers to the practice, see U.S. Const. Art. I, § 9, Cl. 8, and the State Department has an entire office—the Office of Protocol—dedicated to receiving from and offering gifts to foreign representatives and governments, a significant percentage of which have religious content.[11] Those gifts are routinely accepted and sometimes displayed by the President and other federal officials, not as an endorsement of the religious messages they contain, but as a time-honored means of demonstrating respect for the donor.[12]

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[11] See, *e.g.*, 49 Fed. Reg. 46,326, 46,328, 46,331, 46,373 (2004) (gifts to federal officials have included a plate bearing verses from the Quran, a silk rug depicting the crucifixion of Jesus Christ, a medallion bearing the image of Francis of Assisi, and a wooden plaque depicting the Last Supper).

[12] See 5 U.S.C. 7342(c)(1)(B); S. Rep. No. 1160, 89th Cong., 2d Sess. 3-4 (1966) ("for centuries," "foreign nations * * * [have] deemed the exchange of gifts and decorations a standard mark of courtesy, and refusal to accept a mark of discourtesy, amounting at times even to an insult or an affront"); H.R. Rep. No. 2052, 89th Cong., 2d Sess. 1-2, 3 (1966) ("The tender of such gifts and decorations is an old and well-established practice that antedates the foundation of the United States. It is made as a mark of esteem and appreciation by a foreign government and signifies that the

Similarly, privately donated stone blocks, with dimensions only slightly smaller than the Texas monument, were used to complete the Washington Monument on the National Mall. Stones donated by the State of Deseret and by Sunday School children contain sectarian religious inscriptions, such as "Holiness to the Lord" and "suffer the little children to come unto me."[13] The federal government's acceptance and retention of those stones within the Washington Monument cannot plausibly be characterized as endorsing the religious faith they reflect. Rather, by according those gifts the same treatment as other donated stones, the government simply demonstrates respect and gratitude for the generosity of the donors and celebrates the diversity of contributors' expression. At the same time, refusal to accept the stones donated by Sunday School children (or, more accurately, selectively curtaining them or expurgating their inscriptions) solely because of their religious speech would demonstrate a level of official antipathy to religion that is alien to the First Amendment.

And so it is here. Texas has done nothing more than accept and display the gift of the Ten Commandments monument on the same terms and in the same manner as other donated monuments that were consonant with the Capitol grounds' secular theme of historic and cultural influences on the State. The record contains no evidence that government officials solicited a religious donation, exercised control over its content or design, rejected any other monuments on religious (or any other) grounds, or have given selective prominence or attention to its religious message. It would be "peculiar to say that government 'promotes' or 'favors' a religious display by giving it the same access * * * that all

individual so honored has contributed in some small measure to more amicable relations between the United States and the foreign government.").

[13] See George Olszewski, *A History of the Washington Monument, 1844-1968* 12 (1971); http://www.nps.gov/wamo/memstone.htm (discussing stones with religious inscriptions measuring 5.6 feet by 3 feet).

other displays enjoy." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 763-764 (1995) (plurality).[14]

2. The display commemorates the Decalogue's influence on law

The display of the Ten Commandments monument on a line between the State Capitol and the State Supreme Court —buildings devoted to the development of the law—also serves the valid secular purpose of memorializing the Decalogue's influence on American law. The Establishment Clause does not proscribe the government from "taking official note of * * * our religious heritage," *Lynch*, 465 U.S. at 686, or depicting with a religious symbol "the historical origins" of attributes of the Nation's character, *id.* at 680. Such "public acknowledgment of the [Nation's] religious heritage long officially recognized by the three constitutional branches of government," *id.* at 686, is consistent with the Establishment Clause because it simply takes note of the historical *facts* that "religion permeates our history," *Edwards*, 482 U.S. at 607 (Powell, J., concurring), and that religious faith played a singularly influential role in the settlement of this Nation, the founding of its government, and the development of its laws.

Petitioner (Br. 24-26) and a number of his amici challenge the notion that the Ten Commandments played such an influential role in legal history. That argument misses the mark in three respects. First, the issue is whether respondents have a secular purpose for accepting and displaying the Ten Commandments monument, not whether all scholarly and theological debate on the subject of the degree of the Decalogue's influence has been eliminated. It is sufficient that respondents share the secular view of numerous Justices of this Court, judges, Congress, academics, histori-

[14] See also *Board of Educ.* v. *Mergens*, 496 U.S. 226, 249 (1990) ("Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to endorse or disapprove of religion.") (quoting *Wallace*, 472 U.S. at 56).

ans, architects, and Framers themselves, see pages 7-9, *supra*, that the Ten Commandments influenced the development of American law. The mere existence of debate about the degree of that influence does not disprove either the sincerity or the secular character of respondents' avowed and legislatively documented purpose.[15]

Second, even if other legal codes also contributed to the development of the law, petitioner fails to account for the practical reality that the image of the Ten Commandments is a uniquely potent and commonly recognized symbol of the law. Whatever the relative influence of Hammurabi or Teutonic customs on the United States, there is no other historic symbol for the law that has the same currency and resonance with the general public as the image of the Ten Commandments.

Third, petitioner contends (Br. 24-25) that only some of the Commandments directly influenced modern legal prohibitions. Notably, that argument concedes the historical relevance of the Commandments at some level. Beyond that, petitioner significantly understates the nexus between the Commandments and American law. See pages 8-9 & notes 4-5, *supra*. More importantly, the implications of his argument are untenable. The monument at issue contains all Ten Commandments; it is not an isolated display of the three or four most overtly religious Commandments. Because of the symbolic potency of the Ten Commandments and the linkage between many of the Commandments and American law, there are sound secular reasons for displaying the Commandments—all ten—in some manner. Given that, the Establishment Clause surely does not require ignoring that this debate is about the Decalogue, not a septalogue. Nor does it confine government displays to only the "Six or

[15] See *County of Allegheny*, 492 U.S. at 613-614 & n.60 (discerning secular purpose for displaying a menorah, despite enduring debates over the religious and cultural significance of the Chanukah holiday and the appropriateness of using the menorah as a secular symbol); *id.* at 678 (Kennedy, J., concurring in part and dissenting in part).

Seven Commandments," with sand-blasted redactions or governmentally chiseled ellipses of the rest. As petitioner's amici explain (Baptist Joint Comm. Br. 9), "[t]he two Tables of the Commandments are a unified whole," and it is the unified whole that has resonance as a symbol of the law. In permitting government to acknowledge the influence of religion on American history, the Establishment Clause is not so grudging as to compel an ahistorical redaction of influential religious text.[16]

3. The display has independent historical value

Whatever Texas's original motivation for displaying the Ten Commandments monument in 1961, the constitutionally relevant inquiry in a suit for equitable relief brought more than four decades later is whether respondents have a valid secular purpose for retaining the monument. Those secular purposes include not just demonstrating respect and equal treatment for the donor and commemorating the Decalogue's influence on the law, but also the natural desire to keep a historic landmark intact and to avoid the message of hostility to religion that would be conveyed by razing a longstanding monument based on the belatedly voiced sentiment that it is too religious. The Texas Capitol, including its grounds, is a National Historic Landmark, and the parties have stipulated that the Ten Commandments monument "is one element" of that landmark, J.A. 93. Thus, with the passage of time, the Ten Commandments monument "has become part of the history" of the Texas Capitol, *Freethought Soc'y* v. *Chester*

[16] Petitioner imputes (Br. 24) to respondents an unconstitutional purpose based on the fact that the prefatory words "I AM the LORD thy GOD," appear in a larger font than the rest of the monument's text. But the design pattern chosen by the Fraternal Order of Eagles nearly half a century ago says nothing about respondents' purpose for displaying the monument today. In any event, that language is no more religious than other governmentally employed phrases the isolated usage of which this Court has repeatedly indicated are constitutional, such as the National Motto, "In God we Trust", or the daily courtroom cry of "God Save the United States and this Honorable Court."

County, 334 F.3d 247, 266 (3d Cir. 2003), investing the monument with independent value as an integral and visually ingrained component of the historic Capitol landscape. The "desire to preserve a longstanding [monument]" is a valid secular purpose. *Id.* at 251.

Petitioner notes (Br. 22) that the monument was put in temporary storage during a three-year reconstruction project and then reinstalled in 1993 at its original site and reoriented to face a newly constructed sidewalk. That is true, J.A. 50, 91-92, but such commonplace architectural judgments do not amount to endorsing the "content of the monument" (Pet. Br. 22). The starting presumption is that respondents acted lawfully, and petitioner cites nothing in the record suggesting otherwise.[17] Nor is there any logical reason why repositioning a monument to correspond with renovations should be suspect. The decision to reorient the monument was not inconsistent with how other monuments were reinstalled, nor was the monument given any special prominence.[18] Treating the Ten Commandments monument in the same manner and on the same objective architectural terms as all the other monuments affected by the renovation demonstrates evenhandedness, not endorsement.[19]

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[17] See *Mitchell* v. *Helms*, 530 U.S. 793, 863-864 (2000) (O'Connor, J., concurring) ("[I]t is entirely proper to presume that these school officials will act in good faith."); *Mueller* v. *Allen*, 463 U.S. 388, 394-395 (1983) (the Court has been "reluctan[t] to attribute unconstitutional motives to the States, particularly where a plausible secular purpose for the State's program may be discerned from the face of the statute").

[18] Petitioner emphasizes (Br. 22) that some monuments were not reinstalled after the renovation. That development actually occurred a few years later when respondents conformed the Capitol grounds' to its original historical design during the period 1888-1915. See State Preservation Bd., *Master Plan, Historic Grounds of the Texas Capitol* 51-53 (1995). Under that Plan, monuments outside the grounds' original precincts were retained only if they were erected within 50 years of 1915. *Id.* at 53, 75, 77; J.A. 49. Thus the neutral fact of age, not consideration of content, dictated which monuments were retained.

[19] In any event, in the context of passive and inherently non-coercive governmental displays in non-school settings, an inquiry into the subjective purpose of governmental actors rather than the objective purpose served by the display is of dubious value. See U.S. Br. at 26-27, *McCreary County* v. *ACLU*, No. 03-1693. That is particularly so when the decision to install the display occurred decades before the lawsuit and involved government officials long departed from the scene

D. Respondents' Display Has A Valid Secular Effect

1. As part of the entire Capitol grounds display, the monument symbolizes law and commemorates religion's influence on the legal system

The "crucial" consideration under the Establishment Clause is whether respondents' display "ha[s] the effect of communicating a message of government endorsement or disapproval of religion" to an objective observer. *Lynch*, 465 U.S. at 692; see *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 308 (2000). That objective observer "must be deemed aware of the history and context of the community and forum in which the religious display appears." *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring). Petitioner thus errs at the outset (Br. 35-39) in arguing about the effect of the Ten Commandments monument in isolation. "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680.

Placed in context, the Ten Commandments monument does not endorse religion. First, the Ten Commandments monument appears on the grounds of the State Capitol, between the Texas Supreme Court building and the building that houses Texas lawmakers, which is a setting where the image of the Ten Commandments is commonly encountered and is understood as a secular symbol of law and religion's influence on the American legal system. With those surroundings, the Ten Commandments monument would be understood in the same context as the prayer that begins the legislative day itself, see Tex. H.R. Rule 6, § 1(3), and the opening cry of the Texas Supreme Court, "God save * * * this Honorable Court." Such "manifestations in our public

life of belief in God," *Engel*, 370 U.S. at 435 n.21, and of religion's influence on our Nation, far from violating the Constitution, have become "part of the fabric of our society," *Marsh*, 463 U.S. at 792, and are reasonably understood as such by viewers.

Second and more generally, capitol grounds are a location where visitors expect to find monuments and memorials commemorating a broad variety of historical and cultural influences, both religious and secular. In fact, the Texas Capitol grounds "are an extension of the living museum that is the capitol [building]." J.A. 23. The Ten Commandments monument is just one of 17 different "statues, memorials, and commemorations of people, ideals and events that compose Texan identity," Pet. App. 13, and it is displayed in the same manner and on the same terms as other memorials; it receives no unique or disproportionate emphasis.

Third, the Establishment Clause must take account of government's frequent and sensitive role as a recipient of gifts and tributes to the people of the State. When, as here, a display is clearly demarcated as a gift, see Pet. App. 21, viewers are reasonably charged with understanding that the government did not design the monument and that its display, in significant part, reflects respect for the donor.[20]

Just as important, the effects test must take into account the practical impact of compelling the razing of longstanding donated memorials because, decades later, the monument is decreed to be too religious. The selective and targeted demolition of a monument that has been part of the Capitol grounds for 40 years just "because it's religious" would con-

[20] See *County of Allegheny*, 492 U.S. at 619 (Blackmun, J.) ("[A]n explanatory plaque may confirm that in particular contexts the government's association with a religious symbol does not represent the government's sponsorship of religious beliefs."); *Capitol Square*, 515 U.S. at 776 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he presence of a sign disclaiming government sponsorship or endorsement on the Klan cross * * * would make the State's role clear to the community.").

vey a profound message of hostility to religion that is itself antithetical to the very purpose of the Establishment Clause. *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 122 (2001) (Scalia, J., concurring) (citation omitted). Accordingly, whatever factors might have influenced a challenge to the initial installation, a challenge to the failure to include another monument reflecting the contributions of a different religion, or a suit seeking a clearer attribution, a decision to order such a monument removed or a frieze obliterated cannot ignore the Establishment Clause impact of that state action. In that regard, the history of this display in particular, and of public displays that include religious content more generally, is keenly relevant. Just as discontinuing the prayer in *Marsh* would have a different impact than enjoining a new plan to start such a prayer in a different forum, razing a monument that has stood for decades sends a clear message of hostility to religion, which is not something the Establishment Clause sanctions, let alone requires. The First Amendment does not compel "callous indifference to religious groups," *Zorach*, 343 U.S. at 314, or require government to treat religion "as subversive of American ideals," *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment).

Finally, just as the reasonable observer in *Capitol Square* was charged with the knowledge that those capitol grounds were a public forum, see 515 U.S. at 763-765; *id.* at 780-781 (O'Connor, J., concurring), observers must be deemed aware that the Texas Capitol, including its grounds, is a National Historic Landmark, and that the government's continued display of longstanding monuments on such grounds serves the distinct public interest in preserving a historically and culturally significant landscape, *id.* at 781 (the "hypothetical observer also should know the general history of the place"). That is because "history provides a context which changes how the reasonable observer would regard the [monument]." *Freethought Soc'y*, 334 F.3d at 265.

Petitioner contends (Br. 29) that the Court should evaluate the monument's constitutionality based solely on what is "visible when standing before it." That makes no sense logically or jurisprudentially. First, as petitioner himself acknowledges (Br. 35), there are four other monuments in the "immediate vicinity" of the Ten Commandments monument —monuments that thematically coincide with the Fraternal Order of Eagles' focus on children and "ethics and the ideal of a just society." Pet. App. 15. Surely those displays are constitutionally relevant.

Second, nothing in logic or common experience commends adoption of such a cramped frontal-vision test. Visitors to state capitol grounds presumably are interested in a comprehensive tour of the site rather than a brief sally to a single monument. Nor does anything in the record suggest that those who go to the Capitol grounds to conduct business routinely encounter nothing but the Ten Commandments monument, or are otherwise under the misimpression that the monument is some sort of unique and solitary tribute. The brochure of the Capitol grounds that Texas provides discusses the area as a unitary whole, J.A. 112-120, 204-209, and that information, along with the signage that accompanies each memorial, see Def. Exh. 44 at trial (videotape of capitol grounds); J.A. 40, integrates each monument into a larger story about Texas history and culture.

Third, this Court's precedent forecloses petitioner's test. In *Capitol Square*, this Court upheld the display of a cross on capitol grounds, reasoning that observers were charged with knowledge that other unattended displays long since departed from the scene—holiday displays of a Christmas tree and a menorah, a United Way fundraising sign, and exhibits during an arts festival, 515 U.S. at 758—had been permitted on equal terms in that public forum. If the Constitution charges visitors to state capitol grounds with such temporal perspicaciousness, it also can require them to turn their heads and look down the sidewalk, or at least to read the whole capitol grounds brochure before jumping to the

conclusion that a constitutional violation is afoot. See *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 655-656 (2002) (in upholding a school-choice program that included sectarian schools, the Establishment Clause inquiry considered all educational programs available to students, not just the challenged program); *id.* at 672-673 (O'Connor, J., concurring).[21]

What should be controlling in this case is not hypothesized vision tests, but the *legal and factual reality* that (i) the Ten Commandments has an established secular symbolism in representing the law and commemorating religion's influence on the law and government, (ii) the monument has a logical nexus to the location in which it appears in that capitol grounds commonly contain an array of plaques, memorials, and artistic and architectural depictions of influences on the law, (iii) the monument is displayed as part of a larger presentation of historical and cultural influences, and (iv) the Ten Commandments are displayed in the same manner and on equal terms with other monuments or memorials. That focus on equal treatment of speech with religious content and its logical nexus to the purposes of the forum in which it appears has been constitutionally controlling in cases involving active, proselytizing religious speech and the use of substantial governmental resources.[22] No more stringent constitutional test should govern the constitutionality of passive displays of religious speech on public property.

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[21] Petitioner's reliance (Br. 36) on the isolated and elaborate creche display in *County of Allegheny* is misplaced. In that case, the creche appeared by itself in "[t]he main, most beautiful, and most public part of the courthouse," 492 U.S. at 579, and there were no other remotely comparable displays—in terms of content or presentation—anywhere in the courthouse. The Court's refusal to focus exclusively on the menorah is the more relevant lesson of *County of Allegheny*.

[22] See, *e.g.*, *Good News Club*, *supra* (equal access to limited public forum for Christian educational organization); *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (equal funding of sectarian student newspaper); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (provision of state-financed sign language interpreter to parochial school student).

2. *The monument does not reflect sectarian discrimination*

Petitioner (Br. 42) and his amici argue that the Ten Commandments monument is unconstitutional because there is a lack of consensus between faiths on the wording and ordering of the Commandments. As an initial matter, that argument does not call into question the constitutionality of the numerous federal displays of the Ten Commandments that appear without text, with Hebrew or other ancient script, or with Roman numerals.

That being said, the Establishment Clause simply does not differentiate between textual and non-textual (or non-English) depictions of the Commandments. The Court has said time and again that the Establishment Clause permits government to acknowledge the Nation's religious heritage, and it would distort that principle to hold that any acknowledgment of the Ten Commandments' influence must exclude completely the text of the Commandments, when that text is the very reason the Commandments are relevant to American history.

In addition, petitioner's argument ignores the context and character of the display. For example, sectarian disputes over the proper translation of the Bible are widespread. But that does not mean that the display of the Gutenberg Bible (Vulgate translation) in the Library of Congress or the display of the Bible (King James version) used by George Washington at his inauguration reflects a governmental endorsement of the particular translation exhibited. The setting in which such displays occur dispels any linkage between the sectarian content and governmental endorsement. So it is here. The prominent sign on the monument makes clear that respondents did not choose the script for the monument; the Fraternal Order of Eagles did. See *Summum* v. *City of Ogden*, 297 F.3d 995, 1004 (10th Cir. 2002) ("[T]he Eagles are properly considered the 'literal speaker' of the speech contained on the Monument."). No symbol or

seal of the government appears anywhere on the monolith. J.A. 95. Set against the backdrop of the other donated memorials spread across the Capitol grounds, no reasonable viewer would interpret the Ten Commandments display as an overt or covert effort by the government to take sides in a theological dispute. Any residual "benefit there is to one faith or religion" is "indirect, remote and incidental," and thus is not of constitutional moment. *Lynch*, 465 U.S. at 683; see *Elk Grove*, 124 S. Ct. at 2322 (O'Connor, J., concurring) ("Facially religious references" are permissible when "employing the idiom for essentially secular purposes.").[23]

Finally, if universal sectarian agreement is a constitutional prerequisite for government to acknowledge important religious influences, then nothing will pass Establishment Clause muster. As petitioner notes (Br. 7), there are "prominent religions" that "reject the * * * view that there is [the] single God" referenced on United States currency and in the National Motto. The display of a creche is profoundly sectarian, and there is a lack of universal consensus even among those who believe in the divinity of Jesus Christ on the appearance and display of Nativity scenes, or whether Christmas should be celebrated as a holiday at all.

The Ten Commandments significantly influenced the development of American law, and they have become a commonly recognized symbol of the law and religion's influence on it. But if the arguments of petitioner and his amici are accepted, the Commandments can never be displayed in any manner because not all faiths subscribe to the theology from which they derive. On the other hand, if the Commandments can be displayed constitutionally notwithstanding such sectarian disagreement, then the existence of continuing debate between different sects over the precise text should not

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[23] The Fraternal Order of Eagles, for its part, attempted to present a nonsectarian version of the Commandments, so that the selected text cannot be "identified with any particular religious group." *Freedom from Religion Found.*, 898 P.2d at 1017.

foreclose displays like respondents either, as long as the surrounding context and manner of presentation adequately dispel any message of particularized endorsement. By clearly demarcating the monument as a gift, by displaying it in the same manner and on the same terms as a variety of other donated monuments commemorating state history and culture, and by situating the monument in a location that "honors its secular strength" (Pet. App. 17) and underscores its secular nexus to the law, respondents' retention of the Ten Commandments monument as part of their historic Capitol grounds comports with the Establishment Clause. The overall message conveyed by the monument in context is far more consistent with Establishment Clause values than the message that would be conveyed by tearing this longstanding monument down.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Alabama: A small plaque of the Ten Commandments hangs inside the State Capitol. See National Briefs, Miami Herald, Sept. 10, 2003, at 19, *available at* 2003 WL 62530915.

Alaska: The city council chambers in Fairbanks has a depiction of the Ten Commandments. See http://atheism.about.com/b/a/074472.htm?terms=fairbanks.

Arizona: A monument of the Ten Commandments sits on state park land in Wesley Bolin Plaza, just east of the Arizona state capitol in Phoenix. See *Arizonans to Rally for Ten Commandments; Hundreds Expected to Gather, Pray to Call for an End to Judicial Tyranny*, U.S. Newswire, Sept. 22, 2003, *available at* 2003 WL 55662538.

Arkansas: The Ten Commandments are posted in a courtroom in Maumelle County. See *Maumelle Candidates Fail to Leap Out Front*, Arkansas Democrat Gazette, Nov. 3, 2004, at 17, *available at* 2004 WL 96720618.

California: There is a depiction of Moses holding the Ten Commandments over the western entrance to the Los Angeles Superior Court. See http://mayitpleasethecourt.net/journal.asp?blogId=33; http://www.heydaybooks.com/public/books/ccreview1.html.

Colorado: There is a Ten Commandments monument on the lawn of the State Capitol in Denver. There is a similar monument on the lawn in front of the city hall in Grand Junction. See http://www.casperstartribune.net/articles/2003/10/28/news/casper/7a6415c2e299679a2c564c072113f7e6.txt.

Delaware: A framed copy of the Ten Commandments hangs on the wall in the council chamber in the Sussex County administrative office building.

District of Columbia: Both the United States Court of Appeals for the District of Columbia Circuit and the

Supreme Court have Ten Commandments displays in their courtrooms. The National Archives has a display of the Ten Commandments on the floor of its entryway. See Affidavit of David Barton, *Doe* v. *Harlan County Sch. Dist.*, Civ. No. 99-508 (E.D. Ky. 2001), *available at* http://wallbuilders.com/resources/search/detail.php?ResourceID=41. Displays also appear in the Library of Congress and outside of the Ronald Reagan International Trade building.

Florida: In the lobby of the Polk County Administrative Building is a 7-foot, 6-inch monument depicting the Ten Commandments and other documents. See http://www.thomasmore.org/news.html?NewsID=121.

Georgia: The seal of the clerk of the Superior Court in Richmond County contains an outline of the Ten Commandments. See *King* v. *Richmond County*, 331 F.3d 1271 (11th Cir. 2003). The courthouses in Barrow County and Hart County have framed copies of the Ten Commandments outside their courtrooms. See Across Georgia, Augusta Chron., Nov. 8, 2004, at B03, *available at* 2004 WL 96282513.

Idaho: The City of Post Falls has a monument on the lawn in front of its City Hall. There appear to be monuments bearing the Ten Commandments on the lawn on the eastside of the courthouse in Coeur d'Alene and in a park near the City Hall in Hayden. See Erica Curless, *Commandments Abound in Idaho; Low-key Monuments in Public Spaces Seem Unlikely to Inspire Lawsuits*, The Spokesman-Review, Sept. 2, 2003, at A1, *available at* 2003 WL 57389325.

Illinois: There is a mural in the State Supreme Court library that depicts stone tablets with Hebrew written on them.

Indiana: The Washington County courthouse has a display of the Ten Commandments.

Iowa: There is a monument of the Ten Commandments in a plaza by the city hall in Cedar Rapids.

Kansas: There is a stone monolith in front of a municipal building in Junction City. See http://www.kstatecollegian.com/article.php?a=3321.

Kentucky: Displays at issue in *McCreary County, Ky.* v. *ACLU*, No. 03-1693.

Louisiana: A framed copy of the Ten Commandments hangs on the wall of an East Baton Rouge Parish courtroom. See The Week In Review, Baton Rouge Advoc., Aug. 31, 2003, at 4B, *available at* 2003 WL.

Maine: There is a mural depicting Moses carrying stone tablets in the state courthouse in Rumford, Maine.

Maryland: There is a monument on the courthouse lawn in Cumberland, Maryland. See http://www.inthefaith.com/archive/001451.php; http://www.showmenews.com/2004/Oct/20041023Feat004.asp. There is also a monument in a park in Frederick. See http://www.demossnewspond.com/aclj/releases/2004%20Releases/10 command011604.htm.

Massachusetts: There is a depiction of the Ten Commandments in the central panel of a frieze on the north wall in the Boston Public Library. See http://www.sargentmurals.bpl.org/site/murals/24_description. html.

Minnesota: There is a bronze plaque bearing the Ten Commandments on the entrance to the Crow Wing County Courthouse in Brainerd. See http://www.mfc.org/contents/article.asp?id=1123.

Mississippi: There is a statue of Moses holding the Ten Commandments atop the Hinds County Courthouse. See http://home.millsaps.edu/~beckea/Buildings2.html.

Missouri: There is monument of the Ten Commandments on the grounds of the State Capitol in Jefferson City. See http://atheism.about.com/b/a/021266.htm.

Montana: There is a granite monolith bearing the Ten Commandments on the capitol grounds in Helena. See http://www.helenair.com/articles/2004/09/22/montana/a01092204_04.txt.

Nebraska: There is a depiction of the Ten Commandments on a light fixture in the chamber of the State Supreme Court. See http://court.nol.org/tour/tour.htm. On the outside of the State Capitol in Lincoln is a relief showing Moses carrying the Ten Commandments. See http://www.wilhelm-aerospace.org/Architecture/modern/art-deco/nebraska-capitol/ten-commandments.JPG. Fremont has a monument of the Ten Commandments in a public park. See www.journalstar.com/articles/2004/02/19/local/10045545.txt.

Nevada: There is a stone sculpture bearing the Ten Commandments in the Lovelock Courthouse. There is also a display at a senior center owned by the City of Las Vegas.

New Hampshire: A Ten Commandments monument donated by the Fraternal Order of Eagles sits on City-owned land near Somersworth City Hall. See *Religious Monument on City Land Questioned*, Jan. 5, 2005, *available at* http://www.portsmouthhearld.com/news/01052005/news/57349.htm.

New Jersey: There is a Ten Commandments monument in a public park in Trenton.

New Mexico: A monument of the Ten Commandments sits on the lawn in front of the Curry County courthouse in Clovis, New Mexico. See *Curry Courthouse Displays Commandments Monument*, Aug. 29, 2003, *available at* http://amarillo.com/stories/082903/usn_currycourthouse.shtml; Sanford Brickner, *Know Your Rights: Court Case Spotlights Religious Liberty*, Santa Fe New Mexican, Sept. 5, 2003, at C3, *available at* 2003 WL 57253786.

New York: A state courthouse in Brooklyn has a carved medallion on the facade depicting Moses carrying the Commandments. See http://www.courts.state.ny.us/history/elecbook/2ddept/pg13.htm.

North Carolina: The back wall of the main courtroom in the Haywood County Courthouse has a sculpture of the Ten Commandments. See *Suhre* v. *Haywood County*, 55 F. Supp. 2d 384 (W.D.N.C. 1999).

North Dakota: There is a monument bearing the Ten Commandments in a public plaza in Fargo. See http://news.minnesota.publicradio.org/features/2004/10/12_ap_tencommandments. A monument of the Ten Commandments sits outside the Morton County Courthouse in Manden, North Dakota. See http://www.kqcd.com/showNews.asp?whatStory=2137.

Ohio: There is a monument of the Ten Commandments outside the Lucas County courthouse in Toledo. See http://www.aclu.org/ReligiousLiberty/ReligiousLiberty.cfm?ID=16102&c=38.

Oklahoma: There is a monument of the Ten Commandments on the lawn of the Haskell County courthouse. See http://www.amarillo.com/stories/111004/usnten.shtml.

Pennsylvania: The Ten Commandments appears in a mural in the Pennsylvania Supreme Court courtroom in Harrisburg. See Jonathan Gelb, *Commandment Fight Expands to Chester County's Web Site*, Phila. Inquirer, Feb. 26, 2003, at B7; see also http://www.slate.com/id/2075609/slideshow/2075609/fs/0//entry/2075617/. Both the Allegheny County Courthouse and the Chester County courthouse have plaques of the Ten Commandments on their facades. See *Modrovich* v. *Allegheny County*, 385 F.3d 397, 399 (3d Cir. 2004); *Freethought Soc'y of Greater Philadelphia* v. *Chester County*, 334 F.3d 247 (3d Cir. 2003); see also http://www.post-gazette.com/localnews/ 20030627plaquereg4p4.asp.

Tennessee: A plaque bearing the Ten Commandments hangs on the outside of the Washington County court

house. See Melanie B. Smith, *A Busy Time for the Big 10: Ten Commandments Courthouse Controversy Not Solely in Alabama*, The Decatur Daily, Aug. 30, 2003, *available at* http://www.decaturdaily.com/decaturdaily/religion/030830/ten.shtml. There is also a plaque containing the Ten Commandments in the foyer of the Sullivan County Courthouse, *ibid.*, and there is a framed copy of the Ten Commandments in the foyer of the Monroe County Courthouse, *ibid.* We have been advised that courthouses in approximately 45 of the 95 counties in Tennessee have similar displays.

Texas: Display at issue in this case.

Utah: There is a monument of the Ten Commandments in a public park in Pleasant Grove. See http://www.thomasmore.org/news.html?NewsID=214.

Washington: A monument of the Ten Commandments sits on the lawn in front of the police department in Everett, Washington. See BC-Washington Digest, Can. Press, July 24, 2003, *available at* 2003 WL 60142300; see also *Ten Commandments: North News*, Seattle Post-Intelligencer, June 2, 2001, at B1, *available at* 2001 WL 3560440.

West Virginia: A plaque of the Ten Commandments hangs on a wall in one of the courtrooms in the Clay County Courthouse. See http://www.afa.net/clp/ReleaseDetail.asp?id=75.

Wisconsin: The City of La Crosse had a monument of the Ten Commandments in Cameron Park. A federal judge ordered the monument removed. The City then sold the monument and the land around it to the Fraternal Order of Eagles. That sale was recently upheld by the Seventh Circuit. See *Mercier* v. *Fraternal Order of Eagles*, No. 04-1321, 2005 WL 81886 (7th Cir. Jan. 3, 2005).

Wyoming: Cheyenne has a monument of the Ten Commandments in a public park. See www.billingsgazette.com/index.php?id=1&display=rednews/2003/11/25/build/wyoming/42-cheyennetencommandments.inc.